

(Paper 6.4B, SCJC 24 November 2014)

To: Scottish Civil Justice Council

Purpose:

This is a policy paper for the Scottish Civil Justice Council to highlight the changes which the Bankruptcy and Debt Advice Scotland Act 2014 (BADAS Act) is introducing, which relate to a transfer of function from the Scottish courts to the Accountant in Bankruptcy (AiB). We expect that the changes being introduced by the BADAS Act will take effect in April 2015, however it would be prudent to give consideration to matters as there will likely be changes required to the Sheriff Court Rules.

Timing

The BADAS Act has been laid in parliament and is expected to take effect from April 2015.

Summary of Changes

The changes highlighted below provide details of all changes made to the Bankruptcy (Scotland) Act 1985 (the 1985 Act) which will impact upon the court process. Changes to the court rules may not be required in relation to each function, however we are highlighting the amendments for your information at this stage.

Debtor contribution order (Section 4 BADAS Act - Section 32C 1985 Act)

Where an award of sequestration is made, AiB must make an order fixing the debtor's contribution towards the sequestration. An order will be made by AiB in every sequestration, however the amount could be assessed as nil. A debtor, a trustee or any interested person can seek a review of any order made by the AiB, to the AiB in the first instance (section 32C(1)). Thereafter, the trustee or the debtor may appeal to the sheriff against any review decision within 14 days from the date of the decision (Section 32C(5)).

Section 32F allows the trustee to vary or quash a debtor contribution order, following any change in the debtor's circumstances. Section 32G allows the debtor to apply to the trustee for a payment break if there has been a reduction of at least 50% in the debtor's disposable income. Where the AiB makes these decisions, the debtor or any interested person may apply to AiB for a review of the decision (Section 32H). Thereafter, if still dissatisfied, the trustee or the debtor may appeal to the sheriff against any review decision of AiB within 14 days from the date of the decision.

Sequestration of a deceased debtor (Section 5 BADAS Act- section 5 1985 Act)

Petitions for the sequestration of a deceased debtor (section 5(3)) shall now be made by debtor application to the AiB. They will no longer be required to be submitted to the Court.

(Paper 6.4B, SCJC 24 November 2014)

Discharge of the Debtor (Section 7 BADAS Act- Section 54C 1985 Act)

Section 54 of the Bankruptcy (Scotland) Act 1985 is amended by the BADAS Act. Automatic discharge has been removed. The trustee will now issue a report to the AiB (where AiB is not the trustee) 10 months after the date of the award of sequestration, regarding the debtors conduct during the sequestration. The AiB may discharge the debtor any time after 12 months from the date of sequestration. Where AiB is trustee, they must produce the same report and make a determination regarding discharge after 12 months from the date of sequestration.

The trustee, any creditor or the debtor may apply to AiB for a review of a decision regarding discharge. The debtor the trustee or any creditor may appeal to the sheriff against any decision of AiB within 14 days from the date of the decision (section 54B(6)).

Section 54F applies where the debtor is not traced and the subsequently makes contact with the trustee. The AiB can determine to discharge the debtor, where AiB is the trustee, 12 months from the date on which the debtor's whereabouts was ascertained, or where AiB is not the trustee 10 months from the date the debtor's whereabouts was ascertained. The debtor or the creditor can apply to AiB of a review of the decision. The debtor, the creditor or the trustee may appeal to the sheriff against any determination of AiB within 14 days from the date of the decision.

Assets discovered after discharge- appointment of Trustee (Section 21 BADAS Act – Section 58D 1985 Act)

Where the trustee is discharged and an asset is thereafter discovered before the expiry of 5 years from the date of sequestration, the AiB can reappoint the trustee. Where AiB makes or refuses to make an order of reappointment, an interested person may no later than 14 days after the date of the decision, appeal to the sheriff (Section 58D).

Application for direction by a trustee (Section 25 BADAS Act- Section 3 1985 Act)

Section 3 of the 1985 Act is amended by inserting section 3A into the 1985. Section 3A allows the trustee to apply to AiB for a direction in relation to any matter arising in sequestration. Applications of this nature are currently made directly to the sheriff and so this will be a change in procedure. Where an application is made to AiB, AiB may apply to the Sheriff for a direction before confirming the position to the applicant. Where the AiB applies to the sheriff for a direction, that decision is final.

Where AiB made the direction, the trustee may apply to AiB for a review of the direction. Thereafter, the trustee may appeal to the sheriff against the decision of AiB within 14 days from the date of the decision. As we understand, such applications to the sheriff would be made in Form 6 (Act of Sederunt (sheriff court bankruptcy rules) 2008).

(Paper 6.4B, SCJC 24 November 2014)

Recall of Sequestration (Section 26 BADAS Act- Section 16/17 1985 Act)

The BADAS Act is amending section 16 and 17 of the 1985 Act regarding recall of sequestration. At present a petition for recall of sequestration may only be made to the Sheriff. Once the amendments of the BADAS Act take effect, an application for recall will be presented to AiB and not the sheriff, in circumstances where the debtor is able to pay his debts in full. An application can be made by the debtor, any creditor, the trustee or any other person having an interest. If an application for recall is being sought for any other reason, the petition will be made to the court. Where a petition for recall is made to AiB, AiB may at any time before deciding to grant the application remit an application to the sheriff (section 17F). Where an application is remitted to the sheriff, the sheriff may dispose of the application in accordance with section 17 (1985 Act) as if it was a petition presented by AiB under section 16 (1985 Act).

Where AiB make a determination regarding an application for recall or a determination regarding the expenses reasonably incurred by a creditor who was a petitioner, the debtor, the creditor, the trustee or any other person having an interest may seek a review of that decision to AiB (section 17G(1)). Thereafter such persons may appeal to the Sheriff against the decision of AiB.

The debtor, any creditor, the trustee and any other person having an interest may appeal to the sheriff against a determination of AiB regarding the fixing of the amount of outlays and remuneration payable to the trustee and a determination of AiB's fees and outlays (Section 17G(5)). Any decision issued by the sheriff on an appeal regarding these matters shall be final.

Appointment of Replacement Trustee (Section 28 BADAS Act- section 25 1985 Act)

The BADAS Act will amend section 25 of 1985 Act regarding the appointment of a replacement trustee. Where a replacement trustee was elected by virtue of a trustee vote, the trustee is required to send a report of the proceedings to the sheriff and the sheriff shall, provided there are no objections, declare the elected person to be the trustee. This function will not transfer to AiB. Accordingly where a replacement trustee is elected by virtue of a trustee vote, the original trustee will send the report of proceedings to AiB. The AiB, provided there are no objections, will thereafter declare the elected person to be trustee. The debtor, any creditor, the original trustee and the replacement trustee may object, to AiB, regarding any matter connected with the election. Where AiB is trustee, they may object to the sheriff via summary application.

Where the AiB make a determination regarding the objection, the parties may seek a review from AiB of that decision within 14 days from the date of the decision.

(Paper 6.4B, SCJC 24 November 2014)

Thereafter the trustee, the objector and any other interested person may by summary application appeal to the sheriff against a decision of AiB (section 25A(8)). Section 25B provides further detail regarding the appeal process to the sheriff.

Replacement of trustee acting in more than one sequestration (Section 29 BADAS Act- section 28A 1985 Act)

Section 29 BADAS Act amends section 28A of the 1985 Act. At present where a trustee acting in two or more sequestration and he dies or ceases to be qualified to continue as trustee, the AiB may by single application apply to the Court of Session to remove the trustee and appoint a replacement. Under new section 28A the AiB can determine that the trustee is removed from office and that a replacement is appointed. An application may be made to AiB by a person having an interest or AiB may propose to make a determination. Where AiB make a determination or appointment, they must notify each sheriff who awarded sequestration.

Where AiB make a determination, the former trustee, any creditor and the debtor may apply to AiB for a review of the decision within 14 days from the date the determination is made. Such person may thereafter appeal to the sheriff against any decision of AiB within 14 days. Any appeal must be made by single petition to the court of session where the appeal relates to two or more sequestrations and they are in different sheriffdoms. In any other case the appeal is to the sheriff.

Removal of trustee and trustee not acting (Section 30 BADAS Act- Section 29 1985 Act)

Section 30 of BADAS Act amends section 29 of 1985 Act. At present section 29 allows a trustee to be removed from office via application to the sheriff by AiB, the commissioners and a person representing 25% in value of creditors. The amendments made will enable AiB to make a determination on the application of the commissioner a person representing not less than one quarter in value of creditors. Where AiB make a determination, the trustee, the commissioners or any creditor may apply to AiB for a review of the decision. Thereafter, they may appeal to the sheriff against any decision of AiB within 14 days from the date of the decision.

Removal of Commissioner (Section 31 BADAS Act- section 30 1985 Act)

Section 31 of BADAS Act amends section 30 of 1985 Act. This amendments means that a commissioner may be removed from office by order of the sheriff if the sheriff is satisfied that the commissioner is no longer acting in the interests of the efficient conduct of the sequestration. This is a new application that may be made to the sheriff. The application can be made by AiB, a person representing not less than one quarter in value of creditors or the trustee. Details of the procedure are noted within new section 30 of 1985 Act.

Contractual Powers of Trustee (Section 32 BADAS Act- section 42 1985 Act)

(Paper 6.4B, SCJC 24 November 2014)

Section 32 of BADAS Act amends section 42 of the 1985 Act. The trustee may adopt any contract entered into by the debtor before the date of sequestration, where the trustee considers that its adoption would be beneficial to the administration of the debtors estate. Where a trustee receives a request to adopt a contract, he must respond within 28 days. The amended to the act will now allow a trustee to seek to extend this period, where the trustee is not the AiB, on application by the trustee to the AiB. The trustee may seek a review of any decision within 14 days of the decision to the AiB. Trustee can appeal to sheriff against any decision of AiB within 14 days from date of decision.

Bankruptcy Restriction Orders (Section 33 BADAS Act– Section 56A-J 1985 Act)

Section 33 of BADAS Act amends section 56A- 56J of the 1985 Act. Bankruptcy Restriction Orders (BRO's) will now be made by AiB or the Sheriff. Previously a BRO was only made by the sheriff on the application of AiB. Whilst AiB can now make BRO's, the sheriff can only make a BRO on the application of AIB.

The BRO can only be made by AiB where it is up to 5 years. If over 5 years, the application will need to go to the sheriff. The AiB, if they made a BRO, can vary or annul a BRO if an application is made by the debtor. If the debtor does not agree with a determination of AiB to vary or annul a BRO, he can appeal to the Sheriff within 14 days from the date of the decision. The AiB can also make an interim BRO. Where the AiB recall an award of sequestration, the AiB may annul any BRO or interim BRO in force in respect of the debtor. If AIB refuse to annul the BRO then the debtor can apply to AiB for a review. An application for review to the AiB must be made within 14 days from the date of recall of sequestration. The debtor may thereafter appeal to the sheriff against the decision of AiB within 14 days from the date of the decision.

Conversion of protected trust deed into sequestration (Section 34 BADAS Act – Section 59A-C 1985 Act)

Section 34 of BADAS Act amends section 59A-59C of the 1985 Act. A member state liquidator will now apply to the AiB for the conversion under Article 37 of the EC regulation for conversion of a PTD into sequestration. Previously an application would be made to the sheriff. The AiB after considering the application can make such order as they see fit. This process will no longer be dealt with by a sheriff.

Power to cure defects in procedure (Section 35 BADAS Act- Section 63 1985 Act)

Section 35 of BADAS Act amends section 63 of 1985 Act. AIB can make an order correcting a clerical or incidental error in a document required by or under this Act or waive a failure to comply with a time limit which is specified by the Act and for which no provision is made under the Act. Such applications were previously made to the sheriff (section 63 application). An order may be made on an application by any

(Paper 6.4B, SCJC 24 November 2014)

person having an interest, or without an application if the AIB proposes to correct or waive a matter.

Where AIB makes an order that affects a matter which is recorded in the ROI, they must, without delay send a certified copy of the order to the keeper. An interested person may request a review to AIB of any decision of AIB. This application must be made within 14 days from date of decision. Thereafter an interested person may appeal to the sheriff against a decision by AiB within 14 days from the date of the decision (section 63B(4)).

Valuation of debts depending on contingency (Section 37 BADAS Act- Para 3 Schedule 1 1985 Act)

Section 37 of BADAS Act amends paragraph 3 of Schedule 1 of the 1985 Act. A creditor may apply to the trustee or the AiB for a value to be put on a debt so far as it is contingent. Previously an application was made to a sheriff.

An interested person may apply to the AIB for a review of a valuation made by AIB or a trustee. The application must be made within 14 days of the date the valuation was made. The AiB may refer the matter to the sheriff for a direction before making a decision. Where AiB do make a decision, an interested person may appeal to the sheriff against that decision, within 14 days from the date of the decision.

Review of decisions made by AiB

Section 38 of BADAS Act allows the AiB to now review a number of decisions which they make, which were previously only capable of review via an appeal to the sheriff. IN all instances where the first review application is to be made to AiB, the relevant person may always seek a review of that decision via an appeal to the sheriff. The decisions capable of review are noted within section 38 BADAS and include the following:

- Termination of interim trustee's functions where not appointed as trustee (Section 13 1985 Act). The determination by AiB is currently reviewable via an appeal to the sheriff, the change is the additional step of the first review to AiB.)
- Termination of Accountant in Bankruptcy's functions as interim trustee where not appointed as trustee (Section 13B 1985 Act)
- Interim preservation of estate (section 18 1985 Act)
- Review of decision not to award sequestration (Section 15 1985 Act)
- Review of decisions about replacement trustee (section 26A 1985 Act)
- Review about decisions of discharge of original trustee (section 27 1985 Act)
- Review of decisions about adjudication of creditor's claims (section 49 1985 Act)
- Review of decision about discharge of trustee (Section 57 and 58A 1985 Act)

SCJC 16 March 2015

Paper 6.1D

(Paper 6.4B, SCJC 24 November 2014)